IN THE MISSOURI SUPREME COURT

No. SC85460

KENNETH L. KUBLEY,
Appellant/Respondent,

v.

MOLLY M. BROOKS,
Respondent/Cross-Appellant,

and

DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT,
DEPARTMENT OF SOCIAL SERVICES,
Respondent/Cross-Appellant.

Appeal from the Circuit Court of Phelps County, Missouri
The Honorable Ralph J. Haslag, Judge
Case No. CV393-0642DR

BRIEF OF RESPONDENT/CROSS-APPELLANT MOLLY M. BROOKS

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STATEMENT OF FACTS

Respondent/Cross-Appellant Molly Brooks does not accept Appellant's Statement of Facts and therefore offers her own statement of facts.

For clarification, throughout this brief, "LF" shall refer to the Second Corrected Legal File and "T" shall refer to the transcript. "SLF" shall refer to Respondent/Cross-Appellant's Supplemental Legal File. Reference to any other legal file will specify the same.

Kenneth Kubley was Plaintiff, is appellant, and is hereafter referred to as Kenneth, and Molly Kubley was Defendant, is now a respondent and cross-appellant, and is hereafter referred to as Molly, she has remarried and is now Molly Brooks. These were the original parties. The State acting through the Division of Child Support Enforcement, its Director and agents, was made a party and is often hereafter referred to as DCSE.

The original parties are the parents of three children Kenneth Leroy Kubley, Jr., born May 21, 1989, Jesse Dylan Kubley and Brady Ryan Kubley, twins, born September 5, 1990. (T 61) They were all born of the marriage. Molly was born May 27, 1971, and was seventeen (17) years old at the time of their marriage on May 27, 1988, (LF 4) and Kenneth was born February 8, 1962, (T 213 - 214) and was twenty-six (26) years old.

On March 25, 1994, the court dissolved the marriage of the parties. (LF 4

- 6) Each party was ordered to provide child support. (LF 5) A Form 14 was completed and attached to the court's written docket entry showing the parties making an equal income. (SLF 6, 7 and 8) Kenneth was shown as earning $4.50 per hour for forty (40) hours a week for a total income of $774.00 per month, and Molly was shown as earning $774.00 a month as an LPN part time employee of Gingerbread House (T 62). This yielded equal amounts of support for the parties of $258.50 each. The decree also placed legal custody jointly and primary physical custody with Kenneth, however, the visitation ordered by the court amounted to Molly having the children fifty percent (50%) of the time. (LF 5) This was, in fact, the way custody was being shared. (LF 99, 100, 101)

On April 8, 1994, Kenneth filed (through an attorney different from his attorney in the March 25, 1994, dissolution) a Motion to Set aside, or Amend the Decree which claimed as its basis that Molly had been damaged by an error in the Decree of Dissolution of Marriage as "Respondent has not been given meaningful visitation with her minor children." (See DCSE's "Corrected Legal File" page 10) Incredibly, the amendment then requested that Kenneth be given full legal and primary physical custody of the children and <u>reduce</u> Molly's visitation to every other weekend and six weeks in the summer with alternating holidays.

Molly questioned Kenneth about the request and was assured that it was

necessary for him to qualify for training through some government program, but that he and Molly would continue to share equally the actual custody of the children and the support order would remain that each provide support for the children. (T 61 - 64, LF 99, 100, 101) Since Kenneth had continued to participate in said custodial arrangements for some time, Molly agreed to the new order.

On April 14, 1994, Judge Haslag entered an amended order. (LF 7, 8) This order changed custody so that Kenneth had primary legal and physical custody and Molly had every other weekend, alternating holidays, and six weeks summer visitation. It was unchanged in any other way and continued to order that each party should provide support to the children. Molly was never represented in these proceedings and relied on Kenneth's representations. (T 61 - 65; LF 4 - 9, 100, 101) And, until long past the time allowed for a motion to set aside or for rehearing, as well as for appeal, Kenneth allowed said shared custody. (T 61 - 64) (LF 101) However, unknown to Molly, Kenneth had begun drawing AFDC on April 1, 1994, and, thus knew at the time, that his actions would trigger a support enforcement action. (LF 10) A fact which, as the trial court has found (LF 100, 101) he concealed from Molly. Unfortunately, Molly discovered his deception too late. At about the same time Kenneth began to deny Molly her fifty percent (50%) time with the children, she was served with

the notice of the Division of Child Support Enforcement's intent to establish a support order. (LF 10 -13, 101, 102) Eventually Kenneth limited Molly to, at most, the minimum visits under the April 14, 1994, order.

As instructed by the notice, Molly contacted DCSE and informed them of the shared custody arrangement and her current minimal employment and that she would be entering school and be unemployed. (T 64, 65) (LF 10-13) She was told to fill out financial information and she did. (T 65) Nothing in the notice advised her of any right to judicial review that she could challenge the very entry of a support order. (LF 10-13) But DCSE established child support based on a prior income. (T 65) It ignored Kenneth's income, showing it not applicable "N/A" on the notice and assessing one hundred percent (100%) of all liability for support against Molly, including medical care and insurance. (LF 10-17)

On September 29, 1994, DCSE issued an order establishing a support obligation against Molly for $381.00. (LF 13 - 16) And, almost immediately began enforcement actions. This order was issued under Section 454.470 RSMo 1986, which is intended to allow the DCSE to establish a child support order where none exists, (T 42 - 44) rather than under Section 454.496 RSMo 1994 which is designed to modify existing child support orders. The agency (DCSE) determined that the April 14, 1994, court order was silent on child support. (T

44) It, therefore, used Section 454.470 RSMo to establish a child support order rather than Section 454.496 RSMo to modify it. (T 44) The September 29, 1994, order was never signed by a judge (T 19; LF 14 - 17) nor reviewed judicially (T 19; LF 14 - 17) and the initiating documents were never signed by an attorney. (T 19; LF 10 - 13) This order, at page 2, informs the recipient that they may request a review of it after three years. (LF 15) But it does not advise of the possibility of judicial review. (LF 10 - 17) The agency does not give credit to the non-custodial parent for time the children are in the non-custodian's home overnight. (T 42)

During the period following this order's entry numerous enforcement efforts were made. (T 66, 67) They included garnishment and contempt. The contempts were filed by the Phelps County Assistant Prosecutor as part of his child support enforcement duties. On or about September 15, 1995, a notice for review was filed by the Assistant Prosecutor for a court date of October 5, 1995. This notice was never served or delivered to Molly. (T 66, 67) Nevertheless, when she failed to appear on October 5, 1995, a warrant was issued for a body attachment and she was incarcerated from October 26, 1995, until November 1, 1995, when the warrant was withdrawn. (LF 102, 103) For some unexplained reason, all of these contempt proceedings took place before Judge Douglas Long, not Judge Haslag, and all were based on an administrative order, not a

judge's signed order. (LF 18 - 20, 101 - 105) Molly was not represented, or notified of her right to be represented, in these contempt proceedings. (LF 105) Therefore, she could not have known that she could have had appointed counsel since she could not afford counsel.

On November 27, 1996, Kenneth filed various motions, including a Motion to Modify. Molly replied with cross motions, including a motion to modify. These motions raised the unlawfulness of the September 29, 1994, DCSE order. In the meantime, DCSE issued a modification order on December 6, 1996, while the case was pending in Circuit Court.

The December 6, 1996, DCSE order was not the result of a petition which had been signed by an attorney, (T 19, 20) nor was said order signed or presented to a judge. (T 19, 20; LF 21, 22, 103) This order was apparently obtained under Section 454.496 RSMo which is the statute for modifying prior support orders and which requires judicial approval.

DCSE was formally made a party by court order, October 1, 1997, as it refused to recognize the pending litigation against Kenneth L. Kubley in whose name it had acted. (SLF - 40, 41) And, on December 4, 1997, a Second Amended Petition naming DCSE as a Third Party Defendant was filed. (SLF 42 - 59) DCSE still ignored the court's jurisdiction and so on February 19, 1998, Motion for Temporary Restraining Order was filed against it. (SLF 66 - 78)

As a result of the motions to modify filed by both Kenneth and Molly, referred to above, a modification of custody and support was made by the Circuit Court pursuant to a stipulation of the parties on September 29, 1998. (SLF 83 - 95) That order awarded Kenneth and Molly joint legal custody with specific physical custodial periods (Kenneth during the school year, Molly all summer, and other shared visitation for each.) It awarded Kenneth $500.00 per month child support, but abated during June and July. Further, said order specifically severed the issues pending between Molly, Kenneth, and DCSE over the orders here in question.

There had been contempt litigation over the summer of 1997 visitation denied to Molly, filed by Molly against Kenneth. (SLF 31-39) But, as mentioned above, by December 4, 1997, Molly had filed her Second Amended claim against DCSE and Kenneth, which more specifically challenged the validity of both administrative orders. (SLF 42 - 59) Molly filed for Temporary Injunctive Relief against DCSE and Kenneth in February 1998. (SLF 64 - 76) Thereafter, various motions were filed by DCSE and others and as a result Molly filed her Third Amended Counter Motion to Modify on May 4, 1998. (SLF 77 - 82) DCSE had filed motions to dismiss on April 16, 1998, and re-adopted its earlier Suggestion in Support of it's Motion to Dismiss the Second Amended Counter Motion filed by Molly. (LF 52 - 59) Molly filed

responsive suggestions on June 19, 1998. (SLF 198) Thereafter, on April 18, 2001, DCSE moved to dismiss on the grounds of estoppel. (LF 60 - 62) No other answer or pleading to the Third Amended Counter Motion to Modify was filed by DCSE. Molly objected to the late filing of this defense. (T 17) The matter was taken under advisement and as all parties desired to proceed, the case was heard and evidence presented on all issues on April 30, 2001. Both sides filed either suggestions or briefs. (LF 63, 64, 71 - 85, 89 - 91) The Court ruled on February 8, 2002. (LF 99 - 108)

Meanwhile on February 14, 2000, DCSE had again filed an Administrative Motion to Modify. It alleged that Molly should now pay $732.00 per month child support and maintain health insurance. Molly requested review by an administrative hearing officer. After a hearing held on May 12, 2000, the hearing officer issued her modification judgment and order on July 11, 2000. This judgment declared that Molly should pay $543.00 per month with no abatement for summer periods of custody and maintain health insurance. The evidence was, and the hearing officer found, that insurance for the three children under Molly's employer's plan would cost her $465.00 per month, but that she was free to get private insurance at what might be a more affordable cost. On August 4, 2000, Molly filed a Petition for Review of the administrative order. (SLF 116 - 120) However, on June 28, 2000, Molly had filed her Motion

to Modify against Kenneth alleging numerous changed circumstances since the court's modification order in 1998. (SLF 104 - 108) She joined that motion to one seeking review of the DCSE's initial administrative action of February 14, 2000, and for injunctive relief from its continuing attempts to modify the court's orders without any changed circumstances, and for its ignoring of the custodial scheme set out by the court, as well as its unreasonable order as to health insurance. (SLF 109- 115)

Various hearing and trial dates were set, but the case was finally tried on April 30, 2001. (SLF 123 - 131)

On June 8, 2001, the court entered its final and appealable order modifying custody and support by placing the primary custody of the children with Molly and giving Kenneth custody from two weeks after school adjourns until two weeks before it takes up. Kenneth was ordered to pay Molly $275.00 per month child support. Other liberal visitation was ordered and a specific parenting plan and duties regarding health insurance were set out. This order has become final and was not appealed.

The judgment appealed from was entered on February 8, 2002. (LF 99 - 108) Molly was, among other things, awarded $21,649.00 to compensate her for monies collected by DCSE. The amount collected under the challenged orders is not in dispute.

For the court's assistance in following this convoluted cause through its many parts, docket sheets have been supplied at the end of the Supplemental Legal File provided by Respondent. (Pages 132 - 201) Please note that the docket sheets for some time periods, particularly in 1998, as certified by the clerk show different activities at two different places in these sheets so the chronology of filings is not complete unless the reader views the events covered during the same time period at completely different sections of the docket sheets. Respondent/Cross-Appellant cannot explain why this is so.

POINTS RELIED ON

POINT I

REPLY TO APPELLANT'S SOLE POINT ON APPEAL

THE TRIAL COURT DID NOT ERR IN ORDERING THAT KENNETH KUBLEY BE JOINTLY AND SEVERALLY LIABLE WITH DIVISION OF CHILD SUPPORT ENFORCEMENT ON $21,649.00 JUDGMENT TO BE PAID TO MOLLY M. BROOKS FOR MONIES TAKEN UNDER THE COLOR OF A DIVISION OF CHILD SUPPORT ENFORCEMENT ADMINISTRATIVE DEFAULT ORDER, WHICH WAS INVALID, BECAUSE HUSBAND RECEIVED SUBSTANTIAL BENEFIT FROM THE ACTION, KNEW IT WAS OBTAINED AS A RESULT OF HIS HAVING DEFRAUDED WIFE, AND ACTIVELY SOUGHT THE WRONGFUL ENFORCEMENT.

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976)

Palo v. Stangler, 943 S.W.2d 683 (Mo.App. 1997)

Teachers Credit Union v. Olds, 553 S.W.2d 545 (Mo.App. 1977)

Webster v. Sterling Finance Co., 351 Mo. 754, 173 S.W.2d 928, 931 (Mo. 1943)

POINT II

REPLY TO POINT I OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST THE DIVISION OF CHILD SUPPORT ENFORCEMENT (DCSE) BECAUSE THE DCSE USED THE WRONG STATUTORY PROVISION TO ESTABLISH A SUPPORT ORDER AGAINST DEFENDANT MOLLY M. BROOKS AND BY SO DOING ATTEMPTED TO OVERTURN THE DETERMINATION OF THE TRIAL COURT AS TO HOW THE CHILDREN SHOULD BE SUPPORTED WHICH IS A PURELY JUDICIAL DUTY.

Rule 83.08(b)

Rule 84

§454.470 RSMo 1986

§454.496 RSMo 1994

Dye v. Division of Child Support Enforcement, 811 S.W.2d 355, 360 (Mo.banc 1991)

§454.460 RSMo

Shockley v. Division of Child Support, 980 S.W.2d 173, 175 (Mo.App.E.D.1998)

Binns v. Missouri Division of Child Support Enforcement, 1 S.W.3d 544, 547

(Mo.App.E.D. 1999)

Garcia-Huerta v. Garcia, 103 S.W.3d 206, 209-211 (Mo.App.W.D. 2003)

§454.460(14)

§454.460(2)

Supreme Court Rule 88.01

Supreme Court Rule 55.03

POINT III

REPLY TO POINT II OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST THE DIVISION OF CHILD SUPPORT ENFORCEMENT AS ALLEGED BY THE DIVISION BECAUSE SOVEREIGN IMMUNITY DOES NOT APPLY IN THIS CASE AND WAIVER OF IT IS NOT REQUIRED.

Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.banc 1977)

Palo v. Stangler, 943 S.W.2d 683 (Mo.App.1997)

Gavan v. Madison Memorial Hospital, 700 S.W.2d 124 (Mo.App. 1985)

Thomas v. City of Kansas City, WD 60046 (Mo.App.W.D.2002)

§537.600 RSMo

§1.010 RSMo

POINT IV

REPLY TO POINT III OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL

THE TRIAL COURT DID NOT ERR BY ENTERING JUDGMENT AGAINST DCSE BECAUSE MOLLY M. BROOKS WAS NOT BARRED FROM RECOVERY BY THE DOCTRINE OF ESTOPPEL BY COMPLIANCE WITH COURT ORDERS AS HER ALLEGED COMPLIANCE WAS NOT VOLUNTARY AND WAS OBTAINED BY THREAT OF, AND ACTUAL, INCARCERATION, SEIZURE OF HER MEANS TO CHALLENGE THE DCSE ORDER, DENIAL OF STATUTORY RIGHTS TO REVIEW BY BOTH AN ATTORNEY AND A JUDGE, AND DENIAL OF ACCESS TO COUNSEL. IN ADDITION, ESTOPPEL SHOULD NOT HAVE BEEN CONSIDERED AS IT WAS NOT TIMELY PLEAD.

Wampler v. Director of Revenue, 48 S.W.3d 32, 34, 35 (Mo.banc 2001)

Two Pershing Square, 981 S.W.2d 635, 638 (Mo.App. W.D. 1998)

McIntosh v. McIntosh, 41 S.W.3d 60 (Mo.App. W.D. 2001)

Feinberg v. Feinberg, 676 S.W.2d 5 (Mo.App. 1984)

Supreme Court Rule 55.03

Section 454.496

Section 454.470

AS APPELLANT

CROSS-APPELLANT'S POINT I

THE TRIAL COURT COMMITTED ERROR BY NOT AWARDING ACTUAL AND PUNITIVE DAMAGES TO MOLLY BROOKS AGAINST KENNETH KUBLEY BECAUSE IT FOUND THAT HE FRAUDULENTLY OBTAINED A MODIFICATION OF THEIR DISSOLUTION DECREE AND AS A RESULT OF THAT FRAUD, MOLLY WAS REQUIRED TO PAY CHILD SUPPORT WRONGFULLY, LOST THE SOCIETY OF HER CHILDREN THAT SHE REASONABLY EXPECTED, AND WAS THE SUBJECT OF JUDICIAL ACTION WHICH SUBJECTED HER TO HUMILIATION AND PLACED HER IN CIRCUMSTANCES WHICH WOULD BE EMOTIONALLY STRESSFUL FOR ANY REASONABLE PERSON, BUT THE COURT DID NOT AWARD HER ANY DAMAGES, EVIDENTLY BECAUSE IT BELIEVED RECOVERY WAS BARRED BY A CONCEPT IT CALLED "INTERVENING FACTORS," WHICH CONCEPT IS INAPPLICABLE IN THIS CASE, AND SO ERRONEOUSLY APPLIED THE LAW.

Kramer v. Leineweber, 642 S.W.2d 364 (Mo.App. S.D. 1982)

Kipper v. Vokolek, 546 S.W.2d 521, 525 - 526 (Mo.App. 1977)

Refrigeration Industries v. Nemmers, 880 S.W.2d 912, 918, 919, 920, 921

(Mo.App. W.D. 1994)

Mills v. Murray, 472 S.W.2d 6, 14 - 18 (Mo.App. 1971).

AS APPELLANT

CROSS-APPELLANTS POINT II

THE COURT ERRED IN APPLYING WHAT IT CALLED THE "CASE LAW AS TO INTERVENING FACTORS" TO PREVENT RECOVERY BY MOLLY BROOKS AGAINST DCSE FOR THE BREACH OF ITS CONTRACTUAL OBLIGATION TO CORRECTLY USE ITS STATUTORY FRAMEWORK WHICH BREACH NOT ONLY ALLOWS RETURN OF MONEY HAD AND RECEIVED, BUT ALSO OTHER FORESEEABLE DAMAGES, BECAUSE THE COURT FOUND THE ACTIONS OF DCSE TO BE UNLAWFUL, FOUND THAT THE MONEY TAKEN WRONGFULLY SHOULD BE RETURNED TO MOLLY AND DESCRIBED IN ITS JUDGMENT MUCH OF THE DAMAGE DONE TO MOLLY AND THUS HAD FOUND ALL THE ELEMENTS NECESSARY FOR RECOVERY BUT DID NOT AWARD DAMAGES BECAUSE OF ITS ERRONEOUS BELIEF.

Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976)

Palo v. Stangler, 943 S.W.2d 683, 685 (Mo.App. E.D. 1997)

Mills v. Murray, 472 S.W.2d 6,17,18 (Mo.App. 1971)

Refrigeration Industries v. Nemmers, 880 S.W.2d 912, 919, 920, 921

(Mo.App. W.D. 1994).

ARGUMENT

REPLY TO APPELLANT'S SOLE POINT ON APPEAL

TO THE SUPREME COURT

ARGUMENT

THE TRIAL COURT DID NOT ERR IN ORDERING THAT KENNETH KUBLEY BE JOINTLY AND SEVERALLY LIABLE WITH DIVISION OF CHILD SUPPORT ENFORCEMENT ON $21,649.00 JUDGMENT TO BE PAID TO MOLLY M. BROOKS FOR MONIES TAKEN UNDER THE COLOR OF A DIVISION OF CHILD SUPPORT ENFORCEMENT ADMINISTRATIVE DEFAULT ORDER, WHICH WAS INVALID, BECAUSE HUSBAND RECEIVED SUBSTANTIAL BENEFIT FROM THE ACTION, KNEW IT WAS OBTAINED AS A RESULT OF HIS HAVING DEFRAUDED WIFE, AND ACTIVELY SOUGHT THE WRONGFUL ENFORCEMENT.

NOTE: Appellant did not file a new brief in the Supreme Court so that this response is to his original brief.

Appellant does not challenge the finding of the court that the payment record offered as Defendant's Exhibit A is accurate [(LF 103, 104, and T 46) Defendant's Exhibit A is included in the Appendix to Brief of Respondent at pages A-19 to A-26]. Said exhibit shows that Kenneth Kubley, herein referred to as Kenneth, received substantial monies from support. Nor does Appellant

contest the findings of the court that Kenneth had obtained a change in the original decree by making the representation that the amendment was solely to aid him in getting further schooling. (LF 99 - 101) Implicit in this finding is that the actions of Kenneth were fraudulent because the record reflects his having applied for assistance prior to the representation to Molly (LF 10, T 45). Thus, Kenneth knew that the real reason for the modification was to obtain state monetary support in the form of aid to families of dependant children (AFDC). Finally, Appellant does not contest the finding which is contained in the conclusions portion of the judgment at paragraph 7 (LF 106) that Kenneth was seeking the warrant which resulted in Molly's arrest. Indeed, his current wife admits both that she actively participated in the original 1994 request for child support and in the subsequent modification, and says she did so at Kenneth's request, she even complained about the prosecutor during this time (T 162 - 167).

The trial judge in this case has heard all the evidence and dealt with all the parties from the initial dissolution through the 1998 modification and the 2001 modification which completely changed custody making Molly primary custodian. He has heard the evidence in this case which, taken as a whole, shows Kenneth's treatment of Molly throughout these times to have been unreasonable and often intentionally harmful to her and to her relations with

her children (T 162 - 167). Under Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976) the trial judge is to be affirmed unless his finding is against the weight of the evidence, unsupported by the evidence, or contrary to the law. Appellant has shown no such thing. This trial judge was in the best position possible to determine the truthfulness and reliability of the witnesses. Accordingly, his judgment should be sustained.

The only proceedings this judge was not involved in were, for some unexplained reason, the contempt motions of the prosecutor which were filed against Molly for failure to pay child support under the administrative order. (T 66, 67; LF 18 - 20, 101 - 105)

Palo v. Stangler, 943 S.W.2d 683 (Mo.App.1997) stands for the principle that money wrongfully collected by the Division of Child Support Enforcement (DCSE) must be returned under the theory of money had or received. See also Teachers Credit Union v. Olds, 553 S.W.2d 545 (Mo.App. 1977) and Webster v. Sterling Finance Co., 351 Mo. 754, 173 S.W.2d 928, 931 (Mo. 1943). Palo directly addresses the fact that equitable principles apply, here Kenneth and Molly were both intended to share equally the custody of their children, both had very low incomes, Molly was a student and Kenneth was representing to Molly his intent to become a student. Yet Kenneth used deceit to obtain an advantage against Molly, his clear intent was to cut her off from the children

and keep her in financial ruin. (T 63 - 67) He is, and was, equitably liable for such wrongfully obtained funds. That Molly was ultimately able to rise above Kenneth's actions, obtain a good job, and reclaim her children does not alter the fact that at the time Kenneth was using the Division and the courts to harass and impoverish Molly. She was unable to have her children fifty percent (50%) of the time because of Kenneth's evil deeds, not because of her wishes. (T 63 - 67) The court specifically found that she had minimal income and was in no financial condition to defend herself and states plainly that during the ongoing criminal contempt proceedings she was not offered counsel even though she had that right (LF 105).

Nothing in Appellant's brief justifies reversal of the court's judgment as to the award of restitution to Molly against Kenneth. Kenneth both benefitted from and participated actively in seeking these monies and causing her wrongful incarceration and he did so in bad faith, he cannot now complain of his fate.

POINT II

REPLY TO POINT I OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL TO THE SUPREME COURT

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST THE DIVISION OF CHILD SUPPORT ENFORCEMENT (DCSE) BECAUSE THE DCSE USED THE WRONG STATUTORY PROVISION TO ESTABLISH A SUPPORT ORDER AGAINST DEFENDANT MOLLY M. BROOKS AND BY SO DOING ATTEMPTED TO OVERTURN THE DETERMINATION OF THE TRIAL COURT AS TO HOW THE CHILDREN SHOULD BE SUPPORTED WHICH IS A PURELY JUDICIAL DUTY.

The Director has changed this point on appeal from the language used in its original point. It now, for the first time on appeal, challenges the court's ruling against it on its December 6, 1996, order which was entered at a time when the issue of child support was actively pending before the trial court and was raised in the trial court at that time. This challenge is out of time and Respondent Molly Brooks' objects to this late raising of the claim and requests that the same be stricken. Having not been raised by DCSE in the court of appeals, it is prohibited here and violates Rule 83.08(b) and the spirit of Rule 84. Nevertheless, said claim is discussed in the brief since it has been raised now.

The Division of Child Support relies on its order of September 29th, 1994, for its basis in extracting money from Respondent Molly Brooks. The "order" was issued under the provisions of the statute allowing the DCSE to "establish" an order of support, Section 454.470 RSMo 1986, (which has since been amended) rather than under the provision relating to the modification of support, Section 454.496 RSMo 1994 (since amended.) Note that in its original brief the Division point relied on described this September 29th, 1994 order as a modification but now refers to it an "establishing" of a support order. DCSE determined that the court order was silent as to child support . (T 44) And, that determination was in spite of the fact that DCSE was notified by Molly of the shared fifty percent (50%) custodial arrangement. (T 55) In part this result may be attributed to a policy of DCSE of not giving credit for or consideration for custodial periods which a veteran DCSE worker confirms. (T 42) This creates injustice here because the dissolution decree and court records showed that the court considered and addressed support and ordered what was in effect, direct support by both parents. This was based on an understanding that the parties would share custodial periods equally, and on their relatively equal incomes. Therefore, in order to issue a support order, DCSE should have followed the procedure for modification. This would have required a different

notice than was given, as each statute has a different procedural scheme. It would have required a showing of changed circumstances which would have been impossible since the DCSE "order" was issued immediately after the trial court's order and there was no change. And, use of Section 454.496 RSMo. would have required a judge's review, as well as his signature. This would have also allowed for an appeal. No judicial review is required under Section 454.470 RSMo. 1994, thus preventing a court from inquiring about why its recent order should be changed.

By taking the trial court's language out of context the Division attempts to create a record with does not exist. The Division says the court found "there is no order for Ms. Brooks to pay child support." While those words are used , they do not mean that the court found it had not considered child support. Clearly it had. Further such language could always be used when referring to any person who is not required to pay child support. There is always someone who is not ordered to pay child support. The issue is whether the court considered child support and entered an order not requiring either party to pay the other child support or simply did not consider it at all.

To understand this issue we must answer what is the meaning of this language from Section 474.470(1)?

"1. If a court order has not been previously entered... the Director may

issue a notice and finding of financial responsibility....”

The issue was addressed in Dye v. Division of Child Support Enforcement, 811 S.W.2d 355, 360 (Mo.banc 1991.) That decision has been interpreted to mean that Section 454.470 does not apply if a trial court has addressed the issue of child support. (See Shockley v. Division of Child Support, 980 S.W.2d 173, 175 (Mo.App.E.D.1998) and Binns v. Missouri Division of Child Support Enforcement, 1 S.W.3d 544, 547 (Mo.App.E.D. 1999) And, to the same effect by Garcia-Huerta v. Garcia, 103 S.W.3d 206, 209-211 (Mo.App.W.D. 2003) which also held that Section 474.470 is a limiting statute.

In Binns, the trial judge found “neither party is obligated to the other as and for child support.” *Id*, paragraph 12, page 547. And, in the case before this Court the judge ordered (Page 8, Second Corrected Legal File) in the April 14, 1994, Amended Judgment, “It is further ordered by the court that both parties be required to support the minor children.” The judge at that time had completed a Form 14 showing equal incomes. (SLF 6)

In the judgment appealed from, the Court found at page 2, paragraph 2, that at the time of the April 14, 1994, decree the parents were sharing custody approximately fifty percent (50%) of the time and that the only reason for the modification was to obtain financial assistance for schooling of Mr. Kubley. (See also page 6, paragraphs 2 and 3 of that judgment.) (Second Corrected

Legal File, pages 99 to 108)

No party challenged the above finding on appeal. No party challenged the finding that Mr. Kubley's representation about financial assistance for schooling was fraudulent.

When the foregoing is read in context with the following quoted paragraphs from the trial court's Conclusions of Law, it is evident that the trial court's intent, understanding and original judgment was one in which it intended that neither party pay support to the other. The trial judge evidently felt that the Division's September 1994 support order was an attempt to reverse his ruling when at page 6, paragraph 1 of his conclusions, he made a finding which, taken in context, shows the trial judge's anger that his valid order should be so blithely ignored:

"1. That there was no order for Ms. Brooks to pay child support in the Amended Decree of Dissolution of Marriage entered in 1994. That order was signed by an Associate Circuit Judge validly exercising jurisdiction under Missouri Statute, Missouri Supreme Court, and the local Court Rule of the 25th Judicial Circuit." (LF 104)

Quite evidently the judge was incensed at having his judgment overturned rather than subjected to the modification process which his other findings show he knew would not have resulted in modification. Clearly this is so because

there were no changed circumstances and no party to this appeal makes argument that there were. Most importantly, Judge Haslag obviously considered his judgment to "... a court.... previously entered." Section 474.470(1)

To overcome its misuse of the statute, the Division falls back on two arguments:

One, that there was no court order because there was no order for the payment of money from one parent to another. But as Binns teaches, that is not the standard. The real standard is, per Binns or Dye, did the court act on the support issue? Clearly Judge Haslag did. He did not require either parent to pay to the other any money. That is the same effect as the trial court orders in Binns and Shockley. The case Judge Haslag decided was a dissolution of marriage. It would have been error not to consider child support. The judgment would not have been final if no consideration were given. The evidence shows the court considered it and used language different from Binns, but not differing in meaning and intent. Both mean that no support shall be paid by one parent to another.

The other argument of the Division, put forth at Oral Argument before the Court of Appeals but not in its brief, was that Appellant owed a support duty to her children so there was no harm, no foul. This of course begs the

question tried. If you are wilfully and fraudulently deprived of your children when you would have been supporting them fifty percent (50%) of the time in your home, and such deprivation results from the wrongful conduct of the person claiming child support, do you owe child support?

The trial judge clearly did not think so. If equity is at all applicable here, there is nothing equitable about what Kenneth Kubley did. The State only derives its rights, if any, from him. He, not Molly Brooks, is the wrongdoer. But, if the State had followed its correct statutory framework Kenneth Kubley's scheme would not have worked. That is why it is so important that the State follow rational rules in enforcing its statutes.

The trial judge was further justified in finding that the State used improper methods to collect support from Molly Brooks. Turning first to the Division's Second Corrected Legal File, pages 10 to 13, it can be seen that the notice given to Respondent/Cross-Appellant in 1994 makes no mention of judicial review, and in fact under Section 454.470 unlike Section 454.496 <u>there is no requirement of judicial approval</u>. The notice further indicates that the only question that will be resolved by a hearing is whether you as the non-custodial parent reach an agreement as to how much you can pay or not, because the State will enter an order against you in any event. Further, as frankly admitted by Mr. Robinson, the DCSE employee who testified in this case (T 27, 28) the

agency makes no attempt to collect information about employment on the so called custodial parent, nor does it require him to swear to the truth of information he supplies. (T 29, 30) But, it does use its ability to confirm information against the so called non-custodial parent. And, in this case it did not even consider the income of the custodial parent, nor attribute any income to him. (See Second Corrected Legal File, page 15.) The agency does not give consideration to the amount of time the children live with each parent and will issue an order of support automatically if TANF is involved. (T 41, 42) In other words, although the trial judge here rightly considered the living arrangements of the parties as far as custodial periods, DCSE does not. It does not consider the best interest of the children in encouraging substantial time with both parents. It does not care how an order of support may effect a parent's ability to share time with his or her children. And, if TANF is involved, all that is important to DCSE is getting money. It did not even make an effort to determine if Kenneth Kubley was employed, let alone how much he was capable of earning.

Molly Brooks did talk to DCSE as outlined in the August 1994 notice, but quite clearly she was led to believe that no matter what she did, she would be ordered to pay child support. Even if she was sharing custody. (T 64, 65)

While a parent has a common law duty to support a child, this case is not

about failure to support. Molly Brooks paid $21,649.00. It is about recouping money wrongfully collected in the course of depriving her of the companionship of her children by fraud. And, it is about an agency which chooses, time and again, to misuse a statute which is intended to fill in where Circuit Courts have not yet tread, rather than as a tool to overrule their judgment.

We see in Shockley, Binns, and Garcia as well as the present case, the Division of Child Support Enforcement is frequently utilizing Section 454.470 to "establish" support orders even where trial courts have had custody and support issues before them and issued judgments. If the trial judge has not seen fit to order at least one parent to pay money for child support to the other, the Division proceeds under a theory that there is no court order as to child support. Just since 1998 this approach has been held invalid in Shockley, Binns, and Garcia.

This Court of Appeals and the Division have attempted to distinguish this case from Shockley, Binns, and Garcia based on the language of the trial court's Judgment. Because the trial court completed a Form 14 and addressed child support in its judgment, Respondent/Cross-Appellant Molly Brooks contends there is no distinction, and the trial court's judgment should be affirmed in accordance with said cases.

In Dye v. Division of Child Support Enforcement, 811 S.W.2d 355

(Mo.banc 1991) the court essentially affirmed a trial judge who had decided that no court order, as that term is defined in Section 454.460 RSMo., for the payment of a set amount of support money for a child had been entered. But, that case has several distinctions.

First, the Supreme Court affirmed the judge in an order remanding the case to determine the correct procedure and even allow amended pleadings. So, the trial judge was given a full opportunity to issue his own order as to support.

Second, that case was decided in 1991. There have been at least two amendments to the Child Support Guidelines since, and they now speak clearly to the issue of support in a split custody case like that in Dye where one child is with one parent and another with the other parent. It is not clear from the opinion in Dye whether any consideration of balancing these arrangements in computing a Form 14 was done. Most likely it was not. The outcome of the case might now be different if it were shown that in reaching support orders under current Form 14 guidelines, the Court had considered child support and its ultimate order was, thus, the result of its acting on the issue of child support. The case language dealing with acting upon support should be revisited. *Id* 360.

Third, in the Kubley case the Court spoke to the issue of support directing each party to support the children. And, it completed a Form 14 showing each parent had an equal obligation to support, a fact the parties agreed to.

If any case shows why this issue should be reviewed it is Shockley v. Division of Child Support Enforcement, 980 S.W.2d 173 and 175 (Mo.App.E.D. 1998). Here the Court of Appeals disapproves the use of Section 454.470 by the Division of Child Support Enforcement after a paternity decision. In Shockley after the child's birth he lived, with permission of his mother, with his maternal grandfather who drew AFDC on the child. A paternity action was filed and paternity was established in Mr. Shockley. After hearing evidence in the paternity case, the trial judge found that the application of Form 14 was "unjust and inappropriate." (Shockley, page 174.) It ordered reimbursement of certain public assistance and blood tests, but no support. That was on July 17, 1995. Six months later, the Division, apparently unhappy with the Court's order, filed a Motion to Modify pursuant to Section 454.496 RSMo. 1994. After a hearing on that motion, its own hearing officer found that there were no substantial and continuing changed circumstances sufficient to change the trial court's order.

Evidently frustrated by this outcome, the Division was at it again on March 3, 1997. But, this time the Division had figured out that it did not want to carry the burden of changed circumstances. So, it filed under Section 454.470 to establish a support order.

At page 175 of the Shockley opinion, the court sets out clearly the relationship of Sections 454.460 to Sections 454.520 and Section 452.370 and

makes it clear that the purpose of Section 454.470 is to establish an order where no court has acted, not to overrule prior court orders. Under these statutes, both the administrative scheme and the judicial scheme allow changes in child support only on changed circumstances. There is no special power in the Division to second guess a Circuit Court. Shockley clearly holds, citing Dye, that the issue is not whether some amount of money has been ordered paid, but, whether the Court has acted on the issue of child support.

The trial court in Kubley on April 14, 1994, acted on the issue of child support. It completed a Form 14. It knew the parties were sharing custody and had equal income. It ordered both parties to provide support. It would have been a useless or idle ceremony to order each party to pay the other the same amount of money.

In Binns v. Missouri Division of Child Support, 1 S.W.3d 544 at 547 (Mo.App.E.D. 1999) the Eastern District, in relevant part, affirms a trial judge who reverses a DCSE order for father to pay child support. In that case, pursuant to a Motion for Modification of a dissolution decree, the trial court had on August 10, 1995, given mother primary legal custody of the children, and had continued joint physical custody of the children. In the original decree father had been ordered to pay $50.00 per week per child, but the trial court entered an order in the modification directing that "[n]either party is obliged to

the other as and for child support."

Later, on June 5, 1996, a juvenile court modified father's visitation, but did not address the issue of child support. On September 10, 1996, mother asked DCSE for help and on July 16, 1997, it entered an order for support against father under Section 454.470 RSMo. *Id* 545, 546.

The Binns court in reviewing the matter, held that an order of an administrative agency acting without subject matter jurisdiction is void, and that this may be raised at any time. New Madrid County Health Center v. Poore, 801 S.W.2d 739, 740 (Mo.App.1990) It concluded that Dye at 360 and Shockley at 175 hold that an award of no child support is a set and determinable amount and that an order that neither party is obliged to pay support to the other is a court order for the purposes of Section 454.470 because the court did not fail to act thereby on support. *Id* 547. Respondent/Cross-Appellant contends that in the Kubley case the trial court's language in its April 14, 1994, order, that each party is to support the children, is just another way of saying that neither party is obliged to pay the other child support.

In Garcia-Huerta v. Garcia, 103 S.W.3d 206, 209 - 211 (Mo.App.W.D. 2003) the Western District has joined the Eastern District in its interpretation of Dye. The Court of Appeals holds that DCSE lacked subject matter jurisdiction when it used Section 454.470 incorrectly. Indeed, the Court holds that Section

454.470 is a limiting provision as to DCSE's jurisdiction.

In Garcia there had been a prior support order entered against the father in the 1986 dissolution decree. In October 2000, the child, now 15 years old, moved in with his sister who obtained public assistance. True to form and exactly as stated by Mr. Robinson at page 45 of the transcript in Kubley, DCSE proceeded to seek child support automatically. It filed, on February 5, 2001, a Finding of Financial Responsibility under Section 454.470 against the mother.

In analyzing the case, the Garcia Court states that it must give effect, if possible, to statutes as written citing Boone County v. County Employees Retirement Fund, 26 S.W.3d 257, 264 (Mo.App.W.D. 2000) and to determine the intent of the legislature from the language used and the words in their plain and ordinary meaning. State v. Rousseau, 34 S.W.3d 254, 259 (Mo.App.W.D. 2000)

The Court then looks to the definition of "support order" under Section 454.460(14),

"Support order," a judgment, decree or order, whether temporary, final or subject to modification, issued by a court or administrative agency of competent jurisdiction for the support and maintenance of a child, including a child who has attained the age of majority pursuant to the law of the issuing state, or of the parent with whom the child is living and providing monetary support, health care,

child care, arrearages or reimbursement for such child, and which may include related costs and fees, interest and penalties, income withholding, attorneys' fees and other relief."

and under Section 454.460(2) ***"Any judgment...of a set or determinable amount of support money."***

The Garcia Court points out that the test is not whether there is a support order against a custodial or non-custodial parent, but rather whether there is any judicial undertaking to act on support for the particular child. Because there was still in effect such an order in behalf of the child, DCSE had no subject matter jurisdiction.

Appellant DCSE cites State ex rel Hilburn v. Staeden, 91 S.W.3d 607, 608 for support of its position. But that case dealt with the constitutionality of the legislative scheme and not with proper use of that scheme. The Kubley case does not turn on constitutional questions though it surely highlights some deficiencies in the statute which may not have been brought to the court's attention in the Hilburn case.

Should any issue as to whether modification could have occurred under the correct statute be raised it might be well to point out that leaving aside any doubt as to whether Kenneth was really unemployed or, if so, whether that was a temporary situation or was intentional, still no change in circumstances could

have occurred if he was unemployed because Kenneth was either unemployed as of April 1, 1994, as evidenced by his application for AFDC some fourteen days before the modification was issued by the court on April 14, 1994, or he continued to be employed at a very low, below minimum wage job as shown by the Form 14 used by the court. (SLF 3, 4) Meanwhile, Molly had been accepted into nursing school and was living on minimal income or was unemployed. There is no possible basis for an order of support change based on changed circumstances under these facts.

By failing to follow the correct statutory method to modify the order, the DCSE "order" is void. See Smith v. State, 30 S.W.3d 925, 930 (Mo.App. S.D. 2000), where this Appeals Court held: failure to comply with the required procedure under Section 454.496 results in no authority to impose support. Furthermore, by failing to hold a hearing so that a judge may review and approve or disapprove the action of DCSE that order is not final. It cannot be appealed. See Davis v. Department of Social Services, 15 S.W.3d 42, 45 (Mo.App. W.D. 2000). This requirement of judicial review was crucial to protecting the constitutional and statutory rights of Molly. Had a judge reviewed this "order" he would surely have inquired as to why so recent a judicial decision was being changed, or how the support was calculated, or why Kenneth's income was not applicable. But, this was never done.

The documents, notice, and order, on which DCSE based and issued its order failed to allege, either generally or specifically, what basis for amendment existed. There is no allegation of changed circumstances, either in general terms or specifically. There is no Form 14. Kenneth's income is listed as "not applicable" at page 2 of the Notice and Finding of Financial Responsibility (LF 10) dated August 19, 1994 (against Molly "Goodwin" which was not Molly's correct name, but one attributed to her incorrectly). Further, this order shows State debt beginning April 1, 1994, and claims the same even though this court's first order existed on April 1, 1994, establishing direct support and the court amended its order on April 14, 1994, but continued to order direct support owed. The DCSE September 29th, 1994,"order" then without explanation as to how it was achieved, enters a support order for $381.00 current support and $190.00 toward a declared arrearage of $1,905.00. Neither figure can be supported by the record. In addition, the Director of DCSE must clearly be held to be without power to establish an arrearage against an existing court order. This is an attempt to retroactively modify this trial court's order. This is not lawful and the trial court could not have entered such a modification itself. DCSE thus must claim more authority or greater jurisdiction than trial courts.

In addition, the order directs the purchase of health insurance. There is no showing that health insurance is or was available to either parent at a

reasonable cost. Further, by issuing such an order the Director in effect surcharges Molly the cost of such insurance which cannot have been included in the calculation of child support as it should have been under Supreme Court Rule 88.01.

Judge Haslag who is the trial judge in this appeal is the same trial judge who entered the March 25, 1994, decree of dissolution and who did at that time consider child support. His docket entry shows that he did prepare a Form 14 which was attached to said entry. (SLF 6 - 8) The calculation shows equal child support amounts of $258.50 for each party. Judge Haslag found that the parties were sharing custody equally. (LF 100, 101) Accordingly the act of entering a child support order against each parent to the other would have been an idle ceremony, but the contention of DCSE appears to be that failure to do so allows it to use what is a patently unfair and unjust method in a clearly inequitable way.

Contrary to DCSE's contention as to the decision appealed from, Judge Haslag did not find that he did not enter an order of child support, what he found was that he considered child support and since both custody and the child support obligation were equal, he merely said each party shall support the children directly while in their custody. To claim otherwise is to fly in the face of the facts. Indeed, if the court had not entered an order regarding support the

court would have retained jurisdiction because it failed to dispose of all issues before it. The judgment would not have been final. The language of the court in its 1994 order was clearly intended to show that it had considered the child support issue and, in as much, as the obligations and burdens of each parent were equal they should not expect support from the other, but should provide for the children's needs when they had them in their custody.

On policy grounds alone the Division's argument should be rejected. For, if adopted by this court, then one parent must always be the non-custodial or absent parent and the court system will actually be encouraging further fragmentation of the family relationship. This would be in direct conflict with the trend toward shared custody and the legislative intent expressed under Section 452.375 RSMo 1993 et seq. that parents should be joint custodians. Sometimes an order of support is just not warranted. Sometimes there is no truly identifiable non-custodial or absent parent. The legislature surely did not take away from the courts the discretion to fashion orders to best serve the need of the child by enacting authority for DCSE.

Part of the problem here is DCSE's unbending desire to establish child support orders and its total disregard for the court system. If these were not the basis for the agency's actions why did it not use its powers under the modification provisions of the statute? This is not a case of an illegitimate child

for whom no support has been established or of a still married couple with one parent gone and providing no support. Here the agency simply ignored the court's prior determination.

How did DCSE benefit by its choice of statutory schemes? In the following ways:

The "order" was never approved or signed by a Judge thus saving time, effort, and the risk of rejection. This violates the Supreme Court holding in In Re the Marriage of Chastain, 932 S.W.2d 396 (Mo.banc 1996) which controlled at all relevant times. This case requires that a judicial review occur under Section 454.496 RSMo, the correct statutory method. It declares "default" approval of DCSE orders under Section 454.496 to be unconstitutional. The requirement, if it means anything, means the court must actually consider what the DCSE has done. Something more than an automatic signing of some proffered order. Here Molly never got such a review. And, had such a review been properly conducted i.e. with notice to her, she could have presented her defense. Since this order was never even shown to a judge, let alone "reviewed," it violated the statute at that time and Chastain.

In addition, Chastain says plainly that to modify an order there must be changed circumstances. Here no finding of changed circumstances was ever made, nor was there, in fact, any change in circumstances. The DCSE simply

substituted some technician's judgment for that of the court

But Chastain does not stand alone on this issue. In re Marriage of Slay, 965 S.W.2d 845 (Mo.banc 1998) clearly holds that no judgment can be issued by other than a duly qualified constitutionally established Article V, Section 1, 2, 13, 15, or 16 judge. Molly did not receive the review required by an Article V judge and no such person has signed this "order." And, since such an order is not final and, therefore, not appealable, Molly was denied her right of appeal. See Fowler v. Fowler, 984 S.W.2d 508 (Mo.banc 1999); In re Burnes, 975 S.W.2d 266 (Mo.App. S.D. 1998).

No pleading initiating this order was signed by an attorney. See Minx v. State, Department of Social Services, 945 S.W.2d 453 (Mo.App. W.D. 1997) which held that filing the order with the Circuit Court is a petition for review and must be signed by an attorney. Here the Western District Judges, Hanna, Ellis, and Stith concur that the failure to have attorney review violates Supreme Court Rule 55.03. Thus, Molly again failed to receive the protection inherent in our court system of meaningful review. In this case an initial review by an attorney might have questioned what occasioned this attempt to amend the court's order so soon after it was entered, or how an obligation for support much higher than either parent was shown to have had when the court entered its judgment came to pass.

This order was obtained in a way which made request of an administrative hearing pointless. The agency takes the position that it must "establish" a support order if state assistance is provided to the "custodial" parent. Here, the agency ignored the questionable history of the amended court judgment and designated Molly the "absent" parent. From then on it proceeded to "establish" an order. Even though Molly notified DCSE of the problem, it failed to investigate and likely would have refused to consider her position if it had. Indeed, it does not consider custodial periods with the children. (T 42) Instead the Agency issued its notice under Section 454.470 that she could call and discuss this Notice of Finding within twenty days, but in fact, never would have considered the fact that she was being defrauded by Kenneth, let alone the other issues as to how the support order was calculated. In any event, the notice she received said she could have a hearing only if she requested it within twenty days, it did not inform her of the possibility of court review. (LF 10 - 13) When Molly reported to a DCSE worker the true custody arrangement (T 64, 65) and her employment part time at the Gingerbread House (T 62, 64, 65) she was told to fill out the forms.

Even had she requested administrative review, she would have been unable to prepare meaningfully as DCSE cannot enforce discovery such as interrogatories or production (T 20, 21) necessary to show that she was having

the children fifty percent of the time and that Kenneth was either working or had wilfully and intentionally become unemployed in order to establish this order against her.

On the other hand, had DCSE gone through the proper modification method it would have been burdened by a need to show changed circumstances which could not have been done as there were none. A judge would have had to approve the order and might have inquired why a modification was commenced even before the ink was dry on the dissolution decree. Had an attorney reviewed the petition he or she might have made a similar inquiry.

Molly was destitute and unable to get representation. (T 62 - 67; LF 105) She was almost immediately set upon by the system, in part because of the clamor of Kenneth and his new wife, but, in any event what spare money she might have had was now taken from her by DCSE under a very real threat of incarceration as she was, in fact, jailed for five days, October 26th to November 1st, 1995. (T 66, 67; LF 18 - 20, 101 - 105) Further, the amount of the support order was evidently established by attributing income to Molly which she did not have and none to Kenneth, even though the trial court had found their incomes to be equal. And, the record reflects there were, in fact, no changes in these circumstances.

For all the foregoing reasons the court's ruling was not erroneous but was

reasonable and a long overdue vindication of the wrong done this woman.

In its brief DCSE now, for the first time on appeal, discusses the second order which was part of the collection of child support against Molly. The Chastain case cited above was issued on October 22, 1996, and on December 9, 1996, DCSE issued an order modifying, not the court's order, but, its prior order establishing support. This second order was never signed by a judge and was not based on pleadings signed by an attorney. (T 19, 20; LF 21, 22, 103) In fact, it was placed in another file, a special non-judicial file kept by the Circuit Clerk under a different case number ADAO565; IV-D Case Number XO-01558397A. It was never presented to a judge. It increased Molly's support to $598.00 per month and was instead transmitted to the Clerk by a certification to Circuit Court directing that it be placed on the judgment docket. [Judge Haslag had in open court, and took notice of, the ADAO565 file produced in court which contains the complete ADAO565 history from 1994 to present (T 4). And, the trial court further took notice of the entire dissolution case file CV393-0642DR. (T 3-7) (LF 21, 22, 100 - 104)]

The above mentioned December 9, 1996, order was issued in spite of there having been filed a Motion to Modify on November 27, 1996, so that the trial court had obtained jurisdiction of the issue. In due course a Counter Motion To Modify was filed on January 31, 1997. That Counter Motion specifically

raised the illegal nature of the attempted modifications by DCSE and as a result the Second Amended Counter Motion to Modify was filed on December 4, 1997, specifically naming the Director of DCSE as a party. Thereafter, on February 19, 1998, a motion for temporary relief from the DCSE "orders" was filed and on March 23, 1998, a hearing was held at which, among other things, counsel for DCSE sought leave to require a more definite statement from Defendant in her claim against it. As a result Defendant Molly filed her Third Amended Counter Motion to Modify which sought relief against DCSE on April 13, 1998. That pleading forms the basis of the judgment now before this court.

No appeal of the court's judgment insofar as it finds that December 6, 1996, order void was apparent from the Director's original brief, and to the extent money was collected under that order, Point I of the original brief did not challenge the fact that it was unlawful. Now the Director has untimely attempted to raise this issue. Some of the monies ordered paid to Molly by the court were collected under the December 6, 1996, order and may be calculated by reference to Defendant's Exhibit A. The time period in question being from December 6, 1996, to September 1, 1998.

POINT III

REPLY TO POINT II OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL IN THE SUPREME COURT

THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT AGAINST THE DIVISION OF CHILD SUPPORT ENFORCEMENT AS ALLEGED BY THE DIVISION BECAUSE SOVEREIGN IMMUNITY DOES NOT APPLY IN THIS CASE AND WAIVER OF IT IS NOT REQUIRED.

The Supreme Court in Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.banc 1977) effectively removed the common law sovereign immunity doctrine from the controlling common law of this state. In so doing it relied heavily on the dissenting opinion of Judge Finch in O'Dell v. School District of Independence, 521 S.W.2d 403 (Mo.banc 1975). Palo v. Stangler, 943 S.W.2d 683 (Mo.App.1997) and Gavan v. Madison Memorial Hospital, 700 S.W.2d 124 (Mo.App. 1985) also both recognizing that sovereign immunity is not some blanket immunity from suit. Judge Finch's scholarly opinion traces with particularity the development of sovereign immunity, showing that it applies only to negligent torts. In the present case, the legislature enacted specific statutes as to how DCSE was to proceed in obtaining support orders, and the Supreme Court, pursuant to its authority, promulgated specific rules relating to who may file petitions in court. The Director ignored both. Is this an intentional tort; a breach of a contractual obligation to comply with the statutes directive, or a breach of a duty to act in accordance with law? Whatever or however it is characterized it cannot be mere negligence. As plead, the Director

did other than he or she was authorized to do and Defendant Molly was harmed, not only in the loss of money, but in the consequent, foreseeable ways described therein. No immunity applies. Defendant Molly has already cited Palo v. Stangler, 943 S.W.2d 683 (Mo.App. 1997) for the principle that money wrongfully collected by DCSE must be returned under the theory of money had or received. See also Teachers Credit Union v. Olds, 553 S.W.2d 545 (Mo.App. 1977) and Webster v. Sterling Finance Co., 351 Mo. 754, 173 S.W.2d 928, 931 (Mo 1943). Clearly sovereign immunity does not bar recovery of money taken from Molly by DCSE in an inequitable way.

Karpierz v. Easley, 31 S.W.3d 505 (Mo.App. W.D. 2000). Although this case deals with the state Criminal Activity Forfeiture Act (CAFA) Movant believes it shows that sovereign immunity does not run against a claim for money had and received which is plead in this case. See page 511 where Palo v. Stangler is specifically cited. Further, this case seems to show that liability is not dependent on whether defendant kept the money received but only on whether defendant returned it, since in Karpierz Defendant State of Missouri gave the money to the Federal Government

Following the Jones case the legislature adopted Section 537.600 RSMo. Its operative language states:

"1. Such sovereign or governmental tort immunity as existed at common

law in this state prior to September 12, 1977, except to the extent waived, abrogated, or modified by statutes in effect prior to that date, shall remain in full force and effect; ...."

This statute bears the lack of specificity with which Section 1.010 RSMo adopts the common law of England as it existed in 1607, as is discussed in Judge Finch's opinion. So the question becomes one of whether this enactment intended to merely readopt Section 1.010, for surely that is the defining adoption of the common law of sovereign immunity which was enjoyed in Missouri prior to September 12, 1977, or in some way redefine that act? If it is merely a readoption of Section1.010 RSMo then sovereign immunity is merely a common law doctrine and still subject to court limitation and abrogation. If it is a redefinition, it is surely void for vagueness.

However, it is not necessary to resort to the mind numbing mental gymnastics of determining status of the court's ability to modify sovereign immunity posited above. The rule of common law sovereign immunity for tort liability as pointed out by Judge Finch is and was plainly one dealing with negligence. Thus, the court is not faced with modifying the common law. In the case now before this court, the allegations plainly show that the State acted intentionally. Once more they show that the State's intentional conduct was a direct violation of its statutory mandate, not susceptible to misinterpretation,

mistake, or neglect.

Here, the statute under which the Director proceeds directed him to obtain court approval. He did not, even after the Missouri Supreme Court in 1996 reiterated said requirement. Here, the Director was required by Supreme Court Rule to file pleadings by his attorney. He did not. Here the Director was directed to follow a certain process to modify a court order when a court had established an order dealing with child support. He did not.

This is not the only reason sovereign immunity does not apply. The law of England in 1607 could not have contemplated any constitutional limitations as England was, and remains, a parliamentary monarchy rather than a constitutionally controlled democracy. In this country, the constitution is paramount. This is recognized by the language of Section 1.010 RSMo which is by inference adopted by Section 537.600 RSMo.

Due process protections guaranteed by both the State and Federal Constitutions prohibit unlawful taking. As alleged in these pleadings, the acts of the State (i.e. Director) were in violation of constitutional protection. For such violations, sovereign immunity cannot apply since Section1.010 RSMo limits the adoption of English common law to the cases and acts "... not repugnant to, or inconsistent with, the Constitution of the United States, the constitution of this state, ...". Where, as here, there is a conflict between our

constitution and English common law, our constitutional institution must prevail. The legislature could not change this if it tried. But it has not. A mere adoption by specific reference to English common law of sovereign immunity for negligent tort liability does not clothe the government with authority to act in violation of the constitution.

Yet another reason why sovereign immunity does not apply is that the particular type of legal animal, i.e. the Division of Child Support Enforcement, did not exist in England in 1607, nor was such a thing contemplated. Nothing is so ingrained in our tradition of justice, but that in matters of money only a court can take from one citizen and give to another. The idea that a governmental entity could exist which files a complaint before itself and then hears the case, denying to one or both parties the full right of discovery enjoyed by all other litigants, and then renders a judgment, which it enforces directly by the issuing of wage withholding orders, would shock the conscience of the framers of both our state and federal constitutions not to mention the House of Lords. Sovereign immunity could not have been contemplated for such a creature as had not yet been conceived.

It may be worthy of further note that most, if not all, of the legislation under which DCSE now functions was enacted after September 12, 1977. If Section 537.600 adopts the common law of sovereign immunity prior to such

date, it could not be a common law sovereign immunity which addresses the creature known as DCSE or its unique statute

At the end of its brief DCSE attempts to distinguish the Palo case by saying that it was a simple case of over withholding of child support. What difference there is between over withholding, which is illegal, and taking the money in the first place under an unlawful order is not clear to Defendant Molly. Both cases involve an unlawful taking and withholding of money. Both require in equity and good conscience that the money be repaid.

Finally, DCSE argues that Molly will have avoided paying child support for four years if she is awarded her money back. This is not true as she did pay the money. But, it begs the question of whether she should have paid any child support at all. Under the court's ruling as to what happened in fact, she would have owed no support, because she was to have had the children fifty percent (50%) of the time. Simply because Kenneth denied her such custody does not make him entitled to child support, therefore, it cannot be said that Molly had a duty to pay Kenneth anything. Indeed, she was wrongfully denied a substantial time with her children which she will never be able to recover. And, had the State acted in accordance with its legal duties, neither it nor Molly would have paid Kenneth.

Appellant DCSE apparently argues that these cases mean that sovereign

immunity applies to every action against the State regardless of the basis thereof. Further, the implicit argument is that unless an exception is mentioned in the statutory chapter on which most turn, namely Sections 537.600 et seq., then immunity applies. This argument was rejected in Thomas v. City of Kansas City, WD 60046 (Mo.App.W.D.2002) under a section of that opinion entitled "Sovereign Immunity" where the court holds "the statute implicitly, though not explicitly, retains the exception for proprietary functions as to municipalities." This holding and the cases cited therein make clear that exceptions to sovereign immunity which existed prior to the 1977 decision in Jones v. State Highway Commission, 557 S.W.2d 225 (Mo.banc 1977), as well as in cases where it was never applicable, continue to apply under Missouri Law. The enactment of Sections 537.600 RSMo. et seq. have not created some new statutory law of sovereign immunity and while the statute only restores the concept, it only limits the applicability where this statute specifically says it does so, i.e. in motor vehicle or premise liability cases and subject to insurance dollar limitations set out in the statute.

Palo v. Spangler et seq. is still the law of the case. As is Gavan v. Madison Memorial Hospital, 700 S.W.2d 124 (E.D. Mo.App. 1985) holding sovereign immunity does not apply to contractual rights.

POINT IV

REPLY TO POINT III OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT'S BRIEF ON APPEAL IN THE SUPREME COURT

THE TRIAL COURT DID NOT ERR BY ENTERING JUDGMENT AGAINST DCSE BECAUSE MOLLY M. BROOKS WAS NOT BARRED FROM RECOVERY BY THE DOCTRINE OF ESTOPPEL BY COMPLIANCE WITH COURT ORDERS AS HER ALLEGED COMPLIANCE WAS NOT VOLUNTARY AND WAS OBTAINED BY THREAT OF, AND ACTUAL, INCARCERATION, SEIZURE OF HER MEANS TO CHALLENGE THE DCSE ORDER, DENIAL OF STATUTORY RIGHTS TO REVIEW BY BOTH AN ATTORNEY AND A JUDGE, AND DENIAL OF ACCESS TO COUNSEL. IN ADDITION, ESTOPPEL SHOULD NOT HAVE BEEN CONSIDERED AS IT WAS NOT TIMELY PLEAD.

Perkel v. Stringfellow ,19 S.W.3d 141 (Mo.App. S.D. 2000). This case cited by DCSE is not in point. In Perkel Appellant was pro se. He had counsel in his dissolution and in its appeal. After losing the appeal he filed two pro se actions attacking the judgment. Although the Southern District in Perkel mentions estoppel under Schulte v. Schulte, 949 S.W.2d 225 (Mo.App. E.D.1997) this has nothing to do with its denial of this appeal. Appellant never raised the possible defect of no judicial signatures (if indeed there was no

judicial signature) in his direct appeal. As stated at page 150 of the Perkel opinion "the law of the case holds that the adjudication of the direct appeal precludes Appellant from raising such matters again."

Wampler v. Director of Revenue, 48 S.W.3d 32, 34, 35 (Mo.banc 2001). This case reviews estoppel and concludes that where compliance is of no benefit to the Appellant, or is required under penalty of law, it is not acquiescence and, therefore, does not give rise to estoppel. Here the Director of Revenue had complied with the court's order by returning Respondent's drivers license and clearing his record. This did not estop the Director on appeal.

See Two Pershing Square, 981 S.W.2d 635, 638 (Mo.App. W.D. 1998) for the proposition that paying a judgment to avoid interest penalties pending appeal is not voluntary and does not give rise to estoppel.

In McIntosh v. McIntosh, 41 S.W.3d 60 (Mo.App. W.D. 2001) the court thoroughly discusses estoppel and recent cases. In McIntosh, even though Tamara, Appellant therein, did not seem to fit into any specific class of exception to the application of estoppel principles, still the court declines to dismiss her appeal because of her possible confusion as to the nature of her award. This, in spite of the fact that her compliance with the decree, which she appealed, took the form of a benefit to her. Not so, Defendant Molly in the Kubley case. Paying the child support ordered wrongfully was no benefit to her.

Indeed, the Petitioner and DCSE made life miserable for her as she struggled to complete her education and to reclaim her children. If Tamara McIntosh is not foreclosed from her challenge, neither should be Defendant Molly.

Judge Haslag found that Molly was unable to hire private counsel because of her minimal income or to obtain legal aid because that agency would not take such cases at the time. (LF 100 -107) Even had she been able to have an administrative hearing as previously pointed out, she could not have gotten judicial relief because of the wrong statutory scheme used by the State.

Also, as the trial court found the extensive contempt proceedings against Molly based entirely, not on a court's order, but on the September 29, 1994, DCSE "order" were proceedings based on a void "order" of DCSE and the contempt court had no jurisdiction of Molly to hold her in contempt. But, without counsel, she had no way of knowing this. She was jailed, and made, under threat of jail, to "consent" to various withholdings from her wages. She was never offered counsel, a procedural error also of a fatal nature. Because this was criminal contempt, she should have been advised of her right to counsel, right to remain silent, and right to trial.

In Feinberg v. Feinberg, 676 S.W.2d 5 (Mo.App. 1984) an Eastern District case, transfer denied by Supreme Court October 9, 1984, the court holds (at paragraph 13 of the opinion) that estoppel, which is a defense, cannot be

applied unless the acceptance of the decree by the appealing party in some way would harm the Respondent. Here Molly's alleged acceptance was to pay under penalty of jail or by garnishment or involuntary assignment the money that DCSE wished to collect. So, DCSE has been paid. How was it "harmed" by Molly's payment?

Feinberg also deals with the nature of the DCSE challenge here. It is a defense. It was not timely filed, it should be waived. It was not properly plead. It is waived. And, since DCSE had prior filed a Motion to Dismiss on substantive grounds in this proceeding, it is too late to plead this defense on April 16, 2001, over three years after the prior motion to dismiss.

DCSE cites Schulte v. Schulte in support of its position, 949 S.W.2d 225 (Mo.App. E.D. 1997). However, this case stands for nothing. In it Husband appeals a dissolution decree which contained a provision allowing Wife "extra" time to finance a buy out of his share of a business. A contempt proceeding was filed, but both parties agreed not to proceed. However, even though no contempt order existed, Husband voluntarily conveyed his interest to Wife a few days afterward. As he apparently was not contesting the monetary terms of the court ordered sale, only the delay, his action rendered the appeal moot.

DCSE cites State ex rel York, 969 S.W.2d 223 (Mo.banc 1998) for its estoppel argument, but York does not apply. a) Because under Minx supra,

which holds the court lacks jurisdiction because a pleading required to be signed by an attorney, was not filed, waiver does not lie, York, page 225; b) York deals with an appeal of a judicial decision. But, in this case, Molly never was afforded a court hearing, there was never an opportunity to raise her issues before a court, in part because DCSE first used the wrong statutory scheme and because in both the first and second support orders it never presented the "order" to a judge; because c) the second order was issued after Chastain supra, and, therefore, under York, page 225, because the Supreme Court had already held the automatic approval provision of Section 454.496 RSMo unconstitutional DCSE could not claim estoppel; d) because York merely declines to issue a writ of mandamus permanently against the Circuit Judge who issued the April 9, 1998, order, this case has no precedential value as it "declares" the order of Commissioner Rose entered June 10, 1996, to have established the rights of the parties, a result both parties evidently wanted. This is so because both parties lived under and treated the order as final. No appeal was taken, so, no harm, no foul. Yet, here, Molly never had such a chance. She was never in court, and never had her case reviewed by an attorney or a judge.

In In re Burnes, 975 S.W.2d 266 (Mo.App. S.D. 1998) the Southern District reviewed In the Marriage of Slay, 965 S.W.2d 845 (Mo.banc 1998), and York supra and cited Chick v. Chick, 969 S.W.2d 387 (Mo.App. W. D. 1998) for

a case similar to that before it, and dismissed an appeal of a commission's "judgment" entered before Slay as being an unappealable non-judgment. This case shows that the estoppel doctrine does not solve all problems. In Burnes the Appellant had preserved her right to challenge a void order by filing first her Motion for Rehearing and then the appeal. Molly never had such an opportunity because her case was never before a judge, so how could she waive any right? A void order is, still, a void order. And, since DCSE failed to put the case before a judge or comply with Supreme Court Rule 55.03, it failed to meet its burden to act. Those were not Molly's burdens.

In Jezewak v. Jezewak, 3 S.W.3d 860 (Mo.App. E. D. 1999) Husband both sought contempt to enforce a part of the property division and appealed the property division. Wife sought estoppel. The court, at pages 863 and 864, denied Wife's motion to dismiss saying attempted enforcement of part of a decree is not inconsistent with appeal where one seeks on appeal to obtain even more property. If this is not accepting the benefit of the judgment such as to constitute acquiescence in the judgment, how could wife's involuntary act of paying a judgment constitute estoppel or waiver by acquiescence? She had no choice, but Husband in Jezewak need not have sought contempt.

DCSE cites State v. Houston, 989 S.W.2d 950 (Mo.banc 1999) for the proposition that delay in challenging the order may prevent its later being

challenged. However, Houston may be distinguished for the following reasons:

a. In Houston the DCSE complied with the administrative provisions of Section 454.496 (see paragraph 2 of opinion) but in the Kubley case the DCSE did not even use Section 454.496, it incorrectly ignored the trial court's April 14, 1994, judgment and attempted to "establish" an order under Section 454.470. Therefore, unlike Houston there was never compliance with the statute and no opportunity to challenge that defect, or any other, before any judge.

b. Although Ronald Houston challenged the order based on the fact it was not signed by a lawyer, the trial judge raised failure to have the order approved by a judge sua sponte. The Supreme Court never addressed Ronald Houston's claim and it is unclear whether this is because the court treated that issue as not having been ruled by the trial judge or not.

c. The Houston court says the issue was whether the party attempting to set aside the order had a reasonable opportunity to raise the constitutionality of the act before a court of law (see paragraph 10 of the opinion.) In the Kubley case no such mechanism for review existed because DCSE chose the wrong statute. DCSE denied Molly a chance to seek review because it chose an action unauthorized by law and thus void in and of itself, and used a statutory procedure which had no automatic court review. Further,

DCSE would not have considered her custodial arrangement if she had requested review (T 42 - 44) and ignored her when she reported her employment. She was never advised that a court might review these matters.

d. The Houston case appears to be one where no underlying allegation of error or wrong doing exists. Nor is there any hint in Houston that there was any harm to Ronald Houston occasioned by the entry of the order. He appears to merely be intending to take advantage of the mere technical unconstitutionality of the statute. But, here in Kubley there is a real and substantial claim of harm. Furthermore, any compliance with the "order" by Molly has been shown to be involuntary and under not only threat of incarceration but its actual use. In essence, the Kubley case is one of the most horrible examples of abuse of a system that can be imagined. Molly was deprived of her children and kept financially depressed by DCSE's actions taken against her. And, the actions are clearly wrongful. This case, unlike Houston, underlines why the automatic approval part of the statute was declared unconstitutional in the first place and why attorney oversight under Rule 55.03 is required. The facts are different, the case is different.

Houston should be viewed in light of such subsequent cases as Smith v. State, 30 S.W.3d 925 (Mo.App. S.D. 2000), a November 9, 2000, decision of the Southern District discussed elsewhere in the brief which holds non-compliance

with Section 454.496 may result in injunctive relief against such an "order" because the order is not effective. And, Davis v. Department of Social Services, 15 S.W.3d 42, 45 (Mo.App. W.D. 2000) in which the Western District, in a ruling entered April 4, 2000, points out that an un-ruled on DCSE order which had languished for three years in the courts was not final and appealable even when the petition for review was dismissed for want of prosecution and the trial court still had jurisdiction to set aside its dismissal and review the DCSE order.

These cases cast some doubt on the meaning of the Houston decision, especially in light of the incorrect administrative procedure used by DCSE in Kubley. Was the document called the September 29, 1994, "order" ever really an order, even by default? And, was said order appealable? The answer would seem to be "no" on both counts.

As to the December 6, 1996, modification of the Kubley order by DCSE, that order was made subsequent to the Chastain case and so Houston is inapplicable. Further, Molly and Kenneth were already locked in litigation by November, 1996, and the DCSE order was brought into question in that litigation so that it would seem that no estoppel would apply even under Houston.

Finally, the brief of DCSE contends that the compliance of Molly was a result of some mere fear of enforcement which is common to all cases, arguing

that this somehow makes compliance voluntary. Aside from the cases cited above such as Wampler that hold no such thing, Molly here was not in fear of some mere technical possibility. She was, in fact, incarcerated, and she had her wages garnished, she was dragged into contempt court numerous times and agreed to pay to avoid jail. This was no mere threat.

AS APPELLANT

CROSS-APPELLANT'S POINT I

THE TRIAL COURT COMMITTED ERROR BY NOT AWARDING ACTUAL AND PUNITIVE DAMAGES TO MOLLY BROOKS AGAINST KENNETH KUBLEY BECAUSE IT FOUND THAT HE FRAUDULENTLY OBTAINED A MODIFICATION OF THEIR DISSOLUTION DECREE AND AS A RESULT OF THAT FRAUD, MOLLY WAS REQUIRED TO PAY CHILD SUPPORT WRONGFULLY, LOST THE SOCIETY OF HER CHILDREN THAT SHE REASONABLY EXPECTED, AND WAS THE SUBJECT OF JUDICIAL ACTION WHICH SUBJECTED HER TO HUMILIATION AND PLACED HER IN CIRCUMSTANCES WHICH WOULD BE EMOTIONALLY STRESSFUL FOR ANY REASONABLE PERSON, BUT THE COURT DID NOT AWARD HER ANY DAMAGES, EVIDENTLY BECAUSE IT BELIEVED RECOVERY WAS BARRED BY A CONCEPT IT CALLED "INTERVENING FACTORS," WHICH CONCEPT IS INAPPLICABLE IN THIS CASE, AND SO ERRONEOUSLY APPLIED THE LAW.

Two standards of review come into play on this point. First error of law. Error of law may be determined by the independent judgment of the appellate court. Earls v. Majestic Pointe Ltd, 949 S.W.2d 239, 246 (Mo.App.S.D. 1997) Here Appellant Molly Brooks contends the court erred by relying on a concept

it called "intervening factors" which it deemed a legal concept preventing liability. This would be an error of law.

The second standard of review would be under Murphy v. Carron, 536 S.W.2d (Mo.banc 1976) which applies if the court misapplies or misstates the law or its judgment is against the weight of the evidence. Here the trial judge misstates the law as to "intervening factors" misapplies the law because some of the wrongdoing this court finds Kenneth Kubley committed would and did cause damage by depriving Molly Brooks of the companionship of her children and by taking money wrongfully, all regardless of her incarceration. Further, such acts were clearly wilful, wanton, and malicious. Both actual and punitive damages should have been considered and awarded, but were not.

As has been discussed previously, Kenneth asked Molly to consent to a modification of the original decree so that he could get an education. He assured her this would not interfere with her having custodial periods shared with him of about fifty percent (50%) of the time. (T 62 - 66) The trial court found these facts (LF 100, 101) and, Molly so testified (T 61 - 64).

In fact, Kenneth denied Molly her custodial periods (T 63, 64) and he, either in person or through his new wife, vigorously sought enforcement of the DCSE order (LF 106).

As a result, in part at least, of Kenneth's insistence Molly had her wages

garnished, she was repeatedly cited for criminal contempt, and eventually jailed. (T 62 - 66, LF 18 - 20, 99 - 108)

Molly thus was subjected to loss of society of her children and the unlawful taking of money as well as the infliction of emotional stress. This loss occurred both by denial of visitation by Kenneth and by incarceration.

Deprivation of custody is actionable under Kramer v. Leineweber, 642 S.W.2d 364 (Mo.App. S.D. 1982) and Kipper v. Vokolek, 546 S.W.2d 521, 525 - 526 (Mo.App. 1977) and actual and punitive damages are available under this theory.

Further, fraud is actionable in Missouri, including fraud in connection with contract and as such may serve as the basis for actual and punitive damages.

Refrigeration Industries v. Nemmers, 880 S.W.2d 912, 918, 919, 920, 921 (Mo.App. W.D. 1994) see also Mills v. Murray, 472 S.W.2d 6, 14 - 18 (Mo.App. 1971).

The court's error appears to be caused by its focus on the incarceration of Molly as the most reprehensible wrong and its evident belief that Kenneth cannot be held responsible for that event (LF 105). The problem with the court's view is two fold, first, that event was not the only wrong, and second, it was foreseeable. The court uses the term "intervening factors" (LF 106) to

describe its view. However, there is no legal theory relevant to the facts of this case which is described by this term. The evident concept of the court is, lack of foreseeability. Foreseeability is a subjective concept and must be considered under all the circumstances.

Here, Kenneth pushed for the warrant (LF 106). He cannot be allowed to claim that the jailing of a person is not a possible consequence of the issuance of a warrant. The mere fact that the warrant was improvidently granted does not alter the fact that incarceration was foreseeable when contempt of an order is involved and probable when a body attachment warrant is issued.

Even though incarceration is certainly a horrible event and was to Molly, it is not all that occurred to her as a result of Kenneth's wrong doing, she lost her children's companionship, she lost time from school, work, and her daily life, she lost money and under the circumstances anyone would feel emotional stress. Those too are compensable injuries and she should be compensated for them. The court clearly lost sight of these facts because of its evident outrage at what happened to Molly in the wrongful incarceration. This case should be remanded for the court to determine damages against Kenneth.

AS APPELLANT

CROSS-APPELLANTS POINT II

THE COURT ERRED IN APPLYING WHAT IT CALLED THE "CASE LAW AS TO INTERVENING FACTORS" TO PREVENT RECOVERY BY MOLLY BROOKS AGAINST DCSE FOR THE BREACH OF ITS CONTRACTUAL OBLIGATION TO CORRECTLY USE ITS STATUTORY FRAMEWORK WHICH BREACH NOT ONLY ALLOWS RETURN OF MONEY HAD AND RECEIVED, BUT ALSO OTHER FORESEEABLE DAMAGES, BECAUSE THE COURT FOUND THE ACTIONS OF DCSE TO BE UNLAWFUL, FOUND THAT THE MONEY TAKEN WRONGFULLY SHOULD BE RETURNED TO MOLLY AND DESCRIBED IN ITS JUDGMENT MUCH OF THE DAMAGE DONE TO MOLLY AND THUS HAD FOUND ALL THE ELEMENTS NECESSARY FOR RECOVERY BUT DID NOT AWARD DAMAGES BECAUSE OF ITS ERRONEOUS BELIEF

Two standards of review come into play on this point. First error of law. Error of law may be determined by the independent judgment of the appellate court. Earls v. Majestic Pointe Ltd, 949 S.W. 2d 239, 246 (Mo.App.S.D. 1997) Here Appellant Molly Brooks contends the court erred by relying on a concept it called "intervening factors" which it deemed a legal concept preventing liability. This would be an error of law.

The second standard of review would be under Murphy v. Carron, 536 S.W.2d 30 (Mo.banc 1976) which applies if the court misapplies or misstates the law or its judgment is against the weight of the evidence. Here the trial judge misstates the law as to "intervening factors" and misapplies the law because some of the wrongdoing this court finds DCSE committed, would and, did cause damage by depriving Molly Brooks of the companionship of her children and by taking money wrongfully, regardless of any incarceration.

It is evident from the language of paragraph number 7 (LF 106) of the court's Judgment that it denied any damages other than the return of money had and received to Molly against DCSE because of what it called "case law as to intervening factors." Although there is no such theory which is applicable to the facts of this case described by that term, Defendant Molly believes that the court was referring to cases having to do with the foreseeability of the damage caused by the wrongdoer's act. In this case the incarceration of Molly.

The court evidently believed that because the prosecutor and contempt court judge failed to recognize that a body attachment of Molly was unlawful for several reasons, not the least because she had no notice of the hearing at which she failed to appear, this exonerated DCSE from any liability for any other wrong or breach of contract. OR, the court simply lost sight of the other damages. Either way, this approach is erroneous.

Molly was harmed by other events caused by the unlawful order which were independent of the facts of the incarceration. Due to Kenneth's denial, she lost the society of her children for a time and could not afford or obtain counsel to correct this problem because she was kept destitute by DCSE's vigorous enforcement of its order that denied her the means to challenge Kenneth. In addition, Molly lost money taken, time at school, and income as a result of numerous court appearances and her jailing. She was humiliated and placed under what would be to anyone emotional stress. All the direct and proximate result of DCSE's order and its enforcement.

As has been said in Palo v. Stangler, 943 S.W.2d 683, 685 (Mo.App. E.D. 1997) the action for recovery of money had and received sounds in contract. If this be a contract action then other contract principles should apply. It has been held that a recovery of actual damages for breach of contract is available where the breach was the proximate cause of the damages, even if the damages are difficult to ascertain with precision. This being especially true where the breach itself caused such damages as are hard or impossible to establish with much accuracy. See Mills v. Murray, 472 S.W.2d 6,17,18 (Mo.App. 1971) and Refrigeration Industries v. Nemmers, 880 S.W.2d 912, 919, 920, 921 (Mo.App. W.D. 1994). Those cases involve the difficult task of establishing actual damages from breach of a contract not to compete in an employment contract.

In Molly's case the damages arise from the wrongful taking of money and the wrongful enforcement through contempt of a void order which was not the order of any court. The contract is the special relationship of the State and its citizens created by this unusual statutory scheme whereby the State agrees with the parents and children to assure the financial support of the children in a fair and equitable manner and in return saves the State considerable expense for child care. If the children are supported and the parents are fairly treated then all parties benefit.

In Molly's case the State chose to break the contract. In an effort, no doubt, intended to save it time, effort, and risk, the State decided to declare that the dissolution judge had not established support (T 42 - 44) and by so doing felt itself justified in applying Section 454.470 RSMo to the establishment of what it considered a support order rather than by using the correct statutory scheme by applying Section 454.496 RSMo to modify the court's order. By using the wrong statute it did not have to prove changed circumstances which it could not, and did not have to seek judicial approval so it saved effort and the risk of rejection, it even failed to have an attorney review the petition to see if this was a justifiable action. Accordingly, the DCSE breached its contract with Molly. As a proximate result of this action both Molly and her children were harmed. They lost the companionship of one another for some considerable

time. The children lost the direct support they enjoyed with their mother which was no doubt more satisfying than mere money. Molly was deprived of money, income, and freedom. She was forced to suffer garnishment of her wages, frequent court appearances, and the stigma of appearing not to care for her children. She was humiliated and suffered what would be to any ordinary human being emotionally stressful pressures.

All of these damages were predictable, and, foreseeable. Molly told DCSE (T 64, 65) of the true custodial arrangement and financial situation. No one cared or did anything to investigate. But, had DCSE used the correct statutory scheme (had they not breached their agreement) Molly would not have been required to pay child support because there were no changed circumstances. She would have had both judicial review and the review of an attorney to see if the action was justified. A lawyer or judge would surely have questioned why a modification was proceeding so soon after the April 14, 1994, order or why there were inconsistencies in the incomes shown on the judge's Form 14 and whatever figures the agency was trying to use. Most glaringly, they would have looked at the two court orders of March 25th, 1994, and April 14th, 1994, and questioned whether any support order was needed. And, had she not been the subject of these support enforcement actions, she might have more quickly gotten relief from Kenneth's devious denial of custodial periods.

These checks built into the system were never used and with predictable consequence, someone (Molly) was harmed. The court found that during the State's enforcement by contempt Molly "...was not represented by an attorney, could not afford an attorney because of her minimal income at the time, did not qualify for either legal aid or public defender services because of the nature of the proceeding, and, there is no record that she was given an opportunity to get an attorney at public expense." (LF 105) Contempt is a part of DCSE enforcement. Jail is a real part of contempt. DCSE could have foreseen the damages it would cause when it breached its contract with Molly, both, by the taking of money, and by her loss of freedom occasioned by her inability to pay money she did not have. She should have been awarded actual damages.

This case should be remanded with directions for the trial judge to determine actual damages to Molly for DCSE's breach. The court already has evidence of the time Molly and her children were deprived of meaningful relations, of her LPN wages in 1994 and 1995, as well as her RN wages post graduation. (T 62 - 65, 124, 217, 218) It has the complete file of DCSE enforcement actions and Defendant's Exhibit A which will show when garnishments and collection by coercion occurred under the void order. The court could fashion a reasonable damage order.

CONCLUSION

Respondent/Cross-Appellant Molly Brooks prays that the court deny Appellant's sole point and Respondent/Cross-Appellant DCSE's three points and affirm the trial court in all respects related to those points. Respondent/Cross-Appellant prays that the court hold that Molly Brooks is entitled to actual and punitive damages against Kenneth Kubley and actual damages, in addition to the return of her money against both Kenneth Kubley and DCSE and that no rule of law called intervening factors or the principles of foreseeability of damages or any other such principle prohibits the aforesaid award of such damages and remand for the trial court to assess such damages as it sees fit against Kenneth Kubley and DCSE.

Respondent/Cross-Appellant relies on her separate Appendix filed with the Court of Appeals.

Respectfully submitted,

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MOLLY M. BROOKS,
Respondent/Cross-Appellant,

DIRECTOR OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT, DEPARTMENT OF SOCIAL SERVICES,
Respondent/Cross-Appellant.

No. SC85460

CERTIFICATE OF COMPLIANCE WITH RULE 84.06

Pursuant to Rule 84.06(c), the undersigned certifies that, to the best of his knowledge and belief:

1. Respondent/Cross-Appellant's Brief is in compliance with the limitations contained in Rule 84.06(b).

2. Respondent/Cross-Appellant's Brief contains 17,314 words.

3. Respondent/Cross-Appellant's Brief contains 1,658 lines monospaced type.

4. The diskette upon which the electronic copy of Respondent/Cross-Appellant's Brief has been filed has been scanned for viruses and is virus free.

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No. SC85460

CERTIFICATE OF SERVICE

The undersigned, counsel of record for Molly M. Brooks, Respondent/Cross- Appellant in Case Number SC85460, certifies that one copy and one 3½ inch diskette of Respondent/Cross-Appellant's Brief in this cause have been mailed, postage paid to Stephen W. Daniels, Attorney at Law, 610 N. Olive, Rolla, Missouri 65401, and Bart A. Matanic, Assistant Attorney General, Broadway Building, 6th Floor, P.O. Box 899, Jefferson City, MO 65102, on the 30th day of October, 2003.

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